IN THE SUPREME COURT OF MISSOURI

SC 92564

VICTOR ALLRED,

Respondent/Cross-Appellant,

vs.

ROBIN CARNAHAN,

Respondent,

and

THOMAS SCHWEICH,

Appellant/Cross-Respondent,

and

MISSOURI JOBS WITH JUSTICE,

Respondent/Cross-Appellant.

On Appeal from the Circuit Court of Cole County
Honorable Judge Jon E. Beetem

REPLY BRIEF OF RESPONDENT/CROSS-APPELLANT VICTOR ALLRED

June 22, 2012

Respectfully Submitted by:

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Introduction

Irrespective of the level of detail or precise words contained in a summary statement, at a bare minimum, a summary statement must accurately summarize the proposed initiative. A summary may not falsely and misleadingly describe the legal effect of an initiative in favor of what the Secretary of State subjectively believes to be a "common sense" understanding of the law. The Secretary of State and Missouri Jobs With Justice offer little (if any) defense as to the accuracy of the summary statement, but instead rely on the traditional deference granted to the Secretary in drafting her summary. Missouri law places limits on this deference, however. A summary must be "sufficient" and "fair." An inaccurate and misleading summary is neither.

Likewise, regardless of the Auditor and JWJ's ever-changing and inconsistent formulations of the Auditor's duty in preparing fiscal notes and fiscal note summaries, the facts reveal that the fiscal note and summary prepared in this case do not constitute a "sufficient" and "fair" description of the fiscal impact of the initiative. The Auditor performed no research, analysis, or investigation, and the summary misleadingly describes the limited data the Auditor purports to have relied on.

I. CPI Adjustments to the State Minimum Wage is Not an Amendment

Despite their best efforts, the Secretary of State and Jobs With Justice (JWJ) cannot obfuscate or avoid two dispositive facts that fatally undermine the Secretary's summary statement for Initiative Petition 2012-084:

- First, current Missouri law provides that the state minimum wage is annually adjusted according to changes in the Consumer Price Index. § 290.502, RSMo.; and
- Second, the summary statement for the initiative states that it would "amend" Missouri law to "adjust the *state wage* annually based on changes in the Consumer Price Index." L.F. 39, 41.

These two indisputable facts reveal that the summary statement misrepresents to Missouri voters that the initiative would enact a law that, in fact, already exists. This is misleading and unfair to those voters interested in ensuring that petition signatures represent the informed and deliberate choice of Missouri's electorate.

A. Contextual References to Current Law Are Permitted, But Must Not Mislead Voters Regarding the Legal Effect of the Initiative

Though arguing that her reference to the CPI provides "context" necessary to properly inform voters of the legal effect of the initiative, the Secretary does not (and cannot) explain how adjusting the state minimum wage according to the CPI represents an "amendment" to Missouri law. Instead, the Secretary is content to set up and knock down straw-men. For example, she argues that the "preparation of an appropriate summary statement may require providing context for a proper understanding of the proposed amendment." State Br. 14. Mr. Allred agrees. As explained in his opening brief, however, it is the *manner* in which such "context" is provided that matters. In providing "context," the Secretary may not suggest that a change is being made to Missouri law that is not being made. *Missouri*

Municipal League v. Carnahan, 2011 WL 3925612 (Mo. App. W.D. 2011) (trans. denied Dec. 20, 2011) ("*MML II*"). The flaw in the Secretary's summary is not her reference to the CPI, but the *manner* in which she references it.

Similarly, the Secretary asserts that "Plaintiff simply disregards the decision in *MML II*." State Br. 17. To the contrary, unlike the Secretary, who conveniently glosses over the relevant facts of *MML II* in order to pluck quotes out of context, Mr. Allred's opening brief explains the precise holding of *MML II*. Allred Opening Br. 26. As explained therein, the summary statement in *MML II* was upheld because—unlike the summary statement in *MML I*—the Secretary added the phrase "while *continuing* to provide just compensation," which made "clear that the Missouri Constitution currently provides for 'just compensation.'" *MML II*, 2011 WL 3925612 *3. (emphasis added). *MML II* does *not* hold that any and all contextual references to existing law are fair and sufficient. To the contrary, *MML II* turned on the precise *manner* in which such context was provided. *Id*. ("Unlike the language in *MML I*, the language before us does not suggest a change is being made to the current Missouri Constitution with respect to 'just compensation.' The challenged statement clearly states: "*while continuing to provide just compensation*'").

The Secretary notes that, under the measure proposed by the initiative, if the federal minimum wage becomes higher than the state minimum wage, "the federal minimum wage would *become* the state minimum wage." State Br. 16. As a result, the Secretary concludes that she "had to reference the CPI" in order "to

show that the *state minimum wage*, regardless of its source, *is now subject to the CPI*." State Br. 16 (emphasis added). But the state wage is already subject to the CPI. § 290.502, RSMo. Thus, in referencing the CPI, the Secretary was required to make this clear, so that voters are not misled into believing that they must "amend" Missouri law to provide CPI adjustments to the state minimum wage.

Finally, the Secretary argues that revising the summary to state that the "state wage" would "continue" to be adjusted by the CPI "would imply that the initiative petition would not change the CPI's influence on minimum wage." State Br. 17-18. However, as the Secretary concedes, the initiative would merely change the manner by which the state wage is calculated; it would not add a provision adjusting the "state wage" according to changes in the CPI. State Br. 17-18. In other words, any change in the "CPI's influence on the minimum wage" is a result of amending how the "minimum wage" is calculated. *See e.g. Missouri Municipal League v. Carnahan*, 303 S.W.3d 573, 588 (Mo. App. W.D. 2010) ("*MML I*") ("The process for determining just compensation may be affected, but not the establishment of such compensation"). Informing voters that CPI adjustments would "continue" to be applied to the state minimum wage would accurately describe the legal impact of the initiative. Likewise, adding the word "continue" would satisfy the Secretary's stated goal of informing voters that the state minimum wage, "regardless of its source," is subject to annual CPI adjustments. More fundamentally, however, adding this clarification would prevent the Secretary from misleading voters who might support CPI adjustments but not

other aspects of the petition. At bottom, that is why false statements of the legal purpose and effect of a petition are "insufficient" and "unfair."

B. The Initiative Would Not Adjust the "Federal Wage" According to the CPI

Finally recognizing that the Secretary's argument is flawed, JWJ tries a different tack. Using semantic jujitsu to conjure a potential "amendment" regarding the CPI, JWJ proposes a new but implausible interpretation of the initiative. As described in Mr. Allred's opening brief, current Missouri law requires that employers pay the higher of the state or federal minimum wage. Although the state minimum wage is adjusted for inflation, the federal rate is not. The initiative would change this by causing the state minimum wage to increase to meet the federal minimum wage in the event the federal wage is higher. As the trial court concluded, "no longer would it be one or the other," because the higher rate "would become the state minimum wage." L.F. 177.

JWJ now argues that, rather than increasing the state minimum wage to meet the federal minimum wage, the initiative would instead "extend" CPI adjustments to the federal minimum wage. For example, JWJ asserts that, under the proposed amendment, voters making the minimum wage "will get a raise to $8.25 per hour" and "if the federal rate is ever higher [than $8.25], they will get a boost to the federal rate, which will then rise and fall based on changes in the CPI." JWJ Br. 20. In other words, in the event the federal wage is higher than the state wage, JWJ argues that the "state rate would *become* the federal rate." JWJ

Br. 13. *But compare* State Br. 16 ("the federal minimum wage would *become* the state minimum wage"). Thus, JWJ suggests that the initiative would amend Missouri law to "*extend adjustments* based on changes in the CPI from the state rate *to the federal rate* if higher." JWJ Br. 20 (emphasis added).

Not only is JWJ's semantic re-interpretation of the initiative contrary to that of both the trial court and the Secretary, it also contradicts the plain language of the proposed statute. Section 290.502 sets out the state minimum wage for the State of Missouri. The initiative would add the following language to Section 290.502: "If the federal minimum wage rate is increased above the minimum wage rate then in effect under this section, the *higher federal rate shall become the minimum wage rate in effect under this section*." L.F. 28 (emphasis added). The "rate in effect under this section" is the state minimum wage set out in Section 290.502. Thus, under the proposed amendment, in the event the federal minimum wage becomes higher than the state wage, the federal rate "shall become" the state minimum wage. In other words, by operation of law, the state wage will be increased to meet the federal wage, and the newly increased state wage will continue to be adjusted according to the CPI. The initiative would *not* "amend[] the law to make [the] higher federal rate subject to changes in the CPI." JWJ Br. 22. Rather, it would increase the state minimum wage to meet the "higher federal rate," while *continuing* to apply annual CPI adjustments to the increased state wage. Simply put, the initiative would not "amend" the law regarding annual CPI adjustments.

In any event, even if JWJ's creative re-interpretation was correct, it offers no lifeline to the Secretary's summary statement. As noted above, the summary states that the initiative would "adjust the *state wage* annually based upon changes in the Consumer Price Index." L.F. 39 (emphasis added). The summary makes no mention of adjusting the "federal wage" according to changes in the CPI. Thus, if JWJ's interpretation was correct, the summary statement would be insufficient and unfair for *both* (a) falsely stating that it would "amend" Missouri law to adjust the "state wage" according to the CPI *and* (b) failing to state that the initiative would "extend" CPI adjustments to the "federal wage." JWJ's re-interpretation of the proposed amendment is a leap out of the frying pan and into the fire.[1]

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[1] In addition, as set out in Mr. Allred's opening brief, the summary statement does not clearly inform voters of the "super-escalator" effect of the initiative. Nonetheless, the Secretary argues that the summary "provides a description of both the 'super-escalator" and the redefinition of a higher federal minimum wage as the state minimum wage." State Br. 23. The potency of the Secretary assertion, however, is undermined by the fact she drafted an identical summary statement for Version 2 of the initiative, which did not contain the "super-escalator" clause. In response, the Secretary and JWJ merely note that the summary statement for Version 1 is the only summary "at issue" here. State Br. 24; JWJ Br. 22-23. Not so fast. Although the fairness and sufficiency of the summary for Version 2 is not before the Court, the point is this: by drafting an identical summary statement for

II. The Initiative Would Not Increase the State Minimum Wage For Tipped Employers to 60% of the State Minimum Wage

JWJ now concedes that, "technically," the "minimum wage" for tipped employees is not 50% of the state minimum wage. JWJ Br. 25. Rather, like all employees in the State of Missouri, tipped employees must be compensated at or above 100% of the "minimum wage." § 290.512, RSMo. JWJ also concedes, therefore, that the summary statement provides a legally inaccurate description of the initiative, because the summary states that the initiative would "increase the *minimum wage* for employees who receive tips to 60% of the state minimum wage." L.F. 39 (emphasis added).

JWJ posits that this discrepancy in the summary is permissible because "tips put most employees' total compensation over the current minimum wage"[2] and therefore the "50% wage required to be paid by the employer (60% under the proposal) is the functional equivalent of their minimum wage." JWJ Br. 25-26. This is incorrect. The minimum wage refers to the *total compensation* that an employee is entitled to receive under the law, *irrespective of the direct source* of the compensation. Thus, as to tipped employees, both employer-paid wages and tips are combined to determine whether the employee's total compensation equals

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Version 2 (which did not contain the "super-escalator provision"), the Secretary implicitly concedes that the summary for Version 1 fails to clearly describe the "super-escalator" provision contained in Version 1.

[2] JWJ's speculative "facts" are unsupported by any record citation.

or exceeds the minimum wage required by law. § 290.512, RSMo. This is the law. The employer-paid portion of the minimum wage is not the "functional equivalent" of the minimum wage. It is only a portion of the minimum wage.

The Secretary argues that the phrase "minimum wage" should not be interpreted to reference the "state minimum wage," but rather, the minimum "wage" paid by employers. State Br. 21. Inexplicably, the Secretary relies on the definition of "wage" contained in Section 290.500(7), which states that "wage" means the "compensation due to any employee by reason of his employment." State Br. 21. Notably, the definition of "wage" does not refer to the minimum portion of the employee's compensation paid directly by his employer, but rather, all "compensation due" to the employee. § 290.500(7), RSMo. Thus, the Secretary's argument collapses on itself, because tipped employees are entitled to 100% of the "minimum wage" "by reason of [their] employment." § 290.512, RSMo. The minimum "wage" for tipped employees is not a fraction (50% or 60%) of the "state minimum wage." By stating the initiative would increase the "minimum wage" for tipped employees to 60% of the "state minimum wage," the summary inaccurately states the legal effect of the initiative.

The Secretary and JWJ argue that a legally accurate description of the initiative would require "the entirety of the complex minimum wage law" to be detailed in the summary. State Br. 21; JWJ Br. 25. Not so. As Mr. Allred explained in his opening brief, a correct description of the impact of the initiative on tipped employees could be provided using the same number of words as the

Secretary's currently flawed description. Allred Opening Br. 33-34. JWJ objects to Mr. Allred's suggestion that the summary be revised to state that the initiative would "increase the *minimum employer-paid wage* for tipped employees to 60% of the state minimum wage." JWJ Br. 26. The lone basis for its objection is that the phrase "employer paid wage" does not appear in the statute or regulations. *Id*. Thus, JWJ argues that (a) it is permissible to use a phrase assigned a specific meaning in the statute (i.e. the "minimum wage") and assign to it a different meaning in the summary statement (*i.e*. the portion of the "minimum wage" directly paid by employers), but it is impermissible to employ a new, helpful, explanatory phrase in summarizing the initiative. In any event, regardless of the specific semantic formulation, the summary must accurately state that the initiative's proposed increase from 50% to 60% relates to the *portion* of the "minimum wage" directly paid by employers, not the minimum wage due to tipped employees.[3]

[3] The Secretary assures the Court that "interactions between members of the public and tipped employees are sufficiently common that public confusion about the phrasing of the summary statement is very unlikely." State Br. 20. What the Secretary means by this statement is not clear. What is clear, however, is that the Secretary's subjective belief about "interactions between the public and tipped employees" provides no legal basis to support the fairness and sufficiency of a summary statement under Section 116.190, RMSo.

III. JWJ Joins the Auditor in Admitting for the First Time that the Auditor Failed to Undertake His Own Investigation

The most significant statements in the response briefs are JWJ's new judicial admissions that the Auditor fails to make his own "investigation" under Section 116.175, RSMo. *See* JWJ Br. 14, 37, 38. "[W]here a statement of fact is asserted as true in both parties' briefs, we may consider the fact as though it appears in the record." *State ex rel. Missouri Highway & Transp. Comm'n v. Gillespie*, 86 S.W.3d 459, 462 (Mo. App. W.D. 2002); *Ortmeyer v. Bruemmer*, 680 S.W.2d 384, 395 (Mo. App. W.D. 1984) (despite respondent's claim, its appellate response brief made a "judicial admission" of a disputed fact).

JWJ's surprising admissions are an effort to concoct a new, lax standard for judging fiscal notes under Section 116.190. In his opening appellate brief on the constitutional issues, the Auditor made the same admissions. But rather than creating a new, more permissive standard for fiscal notes, these admissions undermine all of the arguments of JWJ and Auditor ("Respondents").

In Mr. Allred's response brief on Respondents' constitutional appeal, he analogized the Auditor to Aesop's dog who opens his jaws to grasp the bone in his reflection, dropping the bone he already has. Now, mimicking the Auditor's argument that Section 116.175 absolves him of making his own investigation, JWJ drops its bone as well:

- "The Auditor does not have the time to undertake an independent investigation." JWJ Br. 14, 38.

- "[T]hat the Auditor must undertake an independent investigation…is not required by statute…" JWJ Br. 37.
- The Auditor does not engage in "double-checking economic theories and assumptions…" JWJ Br. 15.
- The Auditor can simply "rely on [entities'] responses (or non-responses)." JWJ Br. 42.

The Auditor's June 8, 2012 brief makes almost identical admissions:

- The Auditor does not "independently assess the fiscal impact of a proposed initiative." Auditor Opening Br. 12.
- "The Auditor does no analysis or evaluation of the correctness of the proposed impact statements." *Id*.
- The "legislature labored under no fiction that the fiscal note and summary would meet some standard of accuracy." *Id*. at 13.
- The summary statement is not itself an independent analysis, it is merely a "compilation" to "summarize the various proposals, if you will, from high to low." *Id*. at 13.

In what may be a belated attempt to backtrack from his earlier admissions (although JWJ remains a step behind), the Auditor now halfheartedly claims that his sole employee, Jon Halwes, is like an "expert forming his opinion after reviewing and analyzing information." State Br. 32. But this hopeful view of the record is foreclosed by findings of the trial court, which, after closely observing

Mr. Halwes' responses to questions about his process, found as a matter of fact that:

> The facts showed that the Auditor's work was not an "investigation." …At trial…the Auditor's representative admitted that he simply pasted voluntary responses into the fiscal note, and then summarized these receipts in fifty words without making any follow-up inquiry to any of the voluntary responders. He contended that this is all Section 116.175 requires. If the Auditor's mere compilation of responses and "sufficient and fair" summary of those responses is all that Section 116.175 requires, then that statute does not require an "investigation" as the Constitution understands it. Instead, it requires something closer to clerical work.

L.F. 231-232 (Judgment 26-27). The Auditor now tries to overturn this factual finding, but even a passing review of the record shows that Mr. Halwes is nothing like an "expert."

For example, what expert would only review an entity's response to make sure it was "related to" the petition at hand and did not have missing pages or sections? Tr. 32:25-33:9; J.S. 21 ("reasonableness" inquiry does not delve into the substance of the response, but simply makes sure that it the response is "reasonably related to the proposal"). Contrary to the Auditor's claim that Mr. Halwes engages in anything that could be called "researching and verifying the accuracy of information…contained in a submission" (State Br. 32), the trial court

correctly found that Mr. Halwes' work is quasi-clerical. *See* L.F. 232. For example, Mr. Halwes admitted that he merely checked to ensure the proponents' data could be found at the sources they listed, and then re-keyed their multiplication and addition. Tr. 48:2-10. *See also* Tr. 123:6-124:11 (Mr. Halwes admitting on redirect that the "research and data analysis" he initially claimed was "similar to auditing" actually consisted of making sure the proponent's figures were accurately copied from a source document, checking simple arithmetic, and noting that the proponent had tried to copy a 2006 fiscal note).[4] Indeed, Mr. Halwes even admitted that the key number in the proponent's analysis—the number of workers affected—came from a third-party source *that he did not check*. Tr. 124:12-125:4. *Accordingly, Mr. Halwes did not even "verify" the existence of the numbers of workers used by the proponents*. Closer to the truth is what the Auditor admits in a moment of candor in his most recent brief: no matter what submitters say, the Auditor mechanically pastes submissions "essentially

[4] Halwes claimed to apply "proficiencies in "budgeting, accounting auditing and forecasting." Tr. 78:1-4. When asked to identify what elements of "auditing" were actually involved in fiscal notes and summaries, however, Halwes responded only that "research and data analysis" were "the key points." Tr. 78:18-24. As discussed above and as Judge Beetem's "closer to clerical work" finding confirmed, Halwes' work was not "research and data analysis."

verbatim" into the fiscal note. State Br. 33. This is not "expert" work, involves no research or analysis, and could have been performed by a clerk.

The trial court then heard Halwes argue that he "looked at the reasonableness of the assumptions." Tr. 48:11-14. Yet immediately after making this surprising claim, Halwes backtracked, admitting he did nothing whatsoever to check two key assumptions made by the proponent: that workers who make as low as $6.52 per hour are actually "minimum wage" workers who will fully benefit from the increase, and that individuals making well above the new minimum wage would also be benefited. Tr. 48:15-49:24. Again, this is not "expert's" work.

Finally, the Auditor now claims that Mr. Halwes "weighed" and "analyzed" the responses. State Br. 32. But Mr. Halwes "weighed" and "analyzed" nothing with respect to direct costs, as he admitted to simply adding up the few responses he received, failed to ask non-responders why they were silent, and decided based on his own lack of effort that he "didn't have any better information available." Tr. 74:12-20. Further, Mr. Halwes' "analysis" is not based on any sort of objective or expert criteria; it is based on his own case by case, subjective determination about what is "relevant" to "voters." Tr. 34:4-35:1; 66:7-12; 68:1-6; 71:19-72:5; Tr. 73:3-16; 73:25-74:20. Counsel asked Halwes what process he used to form beliefs about "relevance" to "voters," and asked, "ultimately isn't it just guesswork?" *Id*. Rather than responding with any objective or even subjective criteria, Halwes answered, "Well, everything that we're doing here is to

some extent guesswork." *Id*. Guesswork is not expert work, nor is it "research," "analysis," or "investigation."

Even now, backsliding into his previous admissions, the Auditor acknowledges that his current process "does not at any point require [him] to *summarize or explain his analysis*." State Br. 30. How can this square with Section 116.175, which requires a "fiscal note summary" that "shall summarize" the note? A candid "summary" of the Auditor's "analysis" would reveal the man behind the curtain: a single employee who forms beliefs about what voters will think is "relevant," which he admits "to some extent guesswork."

The evidence overwhelmingly supports the trial court's factual finding that Halwes' activity was "closer to clerical work" and was "not an investigation." L.F. 231-232. The Auditor and JWJ cannot impeach this finding. This not only fatally undermines their constitutional appeal, it is fatal to the "sufficiency" and "fairness" of the fiscal note and summary.

IV. Judicial Review of the Auditor's Conduct Is Necessary and Requires No "Political Arbiters"

A. Respondents Create a False Dichotomy Between Blind Acceptance of Their Positions and a Supposedly "Partisan" Judicial Inquiry Into the Auditor's Compliance with the Law

Various strains of the same theory permeate Respondents' briefs: the Auditor's fiscal note represents a fragile political truce, and any meaningful judicial review of his process or product endangers that truce by turning the

Auditor or courts into "political arbiters." JWJ Br. 14; State Br. 39. Such rhetoric implicitly negates the duty of courts to say what the law is and, if necessary, to constrain government bodies within the constitutional limits of their authority. *Missouri Coal. for Env't v. Joint Comm. on Admin. Rules*, 948 S.W.2d 125, 132 (Mo. banc 1997) ("'[i]t is emphatically the province and duty of the judicial department to say what the law is,' *Marbury v. Madison*, 1 Cranch 137, 5 U.S. 137, 2 L.Ed. 60 (1803), and to determine the constitutionality of statutes.").

Additionally, Respondents are arguing another case. Nothing in Mr. Allred's appeal invokes or calls for a political decision. Mr. Allred challenges the sufficiency and fairness of the ballot title, not the wisdom of the petition or fiscal note. Mr. Allred appeals just two fiscal issues: the Auditor's insufficient and unfair (1) statement of direct cost, and (2) concealment of the negative factors the undisputed fiscal note submissions showed would reduce or offset any revenue increase. As explained in Mr. Allred's opening brief, this appeal can be sustained entirely on materials that were actually before the Auditor within the first 15 days. The trial court did not wade into the battle of the experts because it applied an erroneous legal standard, and there is no policy debate for this Court to consider.

Second, Respondents erroneously declare that everything before a Section 116.190 challenge is pristinely apolitical. But the very right to make 10-day submissions is based on a party's political position: Section 116.175.1, RSMo, allows *only* "proponents" or "opponents" to make fiscal submissions within ten days. The general public does not have this right, and the Auditor makes no

announcement or call for comments and information. Accordingly, as JWJ admits elsewhere in its brief at pages 45-48, the statute seems to contemplate that the Auditor will actually consider various political sides (so long as those sides have had time to coalesce and develop facts within the first ten days after a petition is filed). At any rate, this is irrelevant to the issues on appeal.

Relatedly, Respondents suggest that Mr. Grant's submission and the Auditor's acceptance of it were purely objective and that any attack on it injects "partisan" or "political" considerations into a pristine, apolitical process. Only true partisans could make such bold claims. Mr. Grant is JWJ's counsel and—as required by Section 116.175—admitted his submission was a "proponent's." The submission stated Missouri businesses would pay $360 million in new wages and calculated downstream positive tax effects. It silently assumed that businesses could pay the $360 million without decreasing employment, spending, investment, or profits, and that there would be no corresponding tax effects to balance the workers' receipt of $360 million in wages. Tr. 57:21-59:12 (Mr. Halwes only agreed that proponents' analysis was somewhat "incomplete" after being impeached). That massive assumption is not part of this appeal, of course. But by making the decision to paste the proponent's one-sided response into the fiscal note, and add its $14.4 million revenue "increase" into the summary, the Auditor very decidedly "waded into the policy debates." *See* JWJ Br. 14. As the trial court would have observed from Mr. Halwes' demeanor on the stand, if not from the paper record, the Auditor's office did not remain aloof from the policy debate.

Finally, this Court cannot simply assume that every position taken by Respondents is non-political and advances the interests of "the people," while Mr. Allred's positions must be discounted because he harbors some insidious political motive. The Auditor's and JWJ's not-so-subtle suggestion that this Court place its thumb on the scale calls for an impermissible political judgment. Mr. Allred cannot be penalized for enforcing his own right to ensure that the initiative right is counterbalanced with the need for "stable, permanent, organic law" that is fairly enacted without deception or unfairness. *Missourians to Protect the Initiative Process v. Blunt*, 799 S.W.2d 824, 827 (Mo. banc 1990). These are two co-equal concepts. *Id.* Contrary to JWJ's claim that all questions must break their way because they are proponents, Mr. Allred's interests are entitled to equal weight: "Neither concept may be ignored to advance the other, but the two must be balanced." *Id.*

B. The General Assembly Cannot Define an "Investigation" In a Manner that Contravenes the Constitutional Plain Meaning

The Auditor now argues that because the Constitution does not "define" the word "investigation," it must have whatever meaning the General Assembly implicity assigned in Section 116.175. So long as he follows "procedures" allowed by intermediate appellate courts considering Section 116.175, the Auditor claims, his process and product must constitute a constitutional "investigation."

This circular argument fails on many levels. First, as the Auditor later admits, "investigation" *does* have a plain meaning. The Auditor told the trial court

this definition was a "detailed inquiry" and "systematic examination." State Br. 27; L.F. 231. As that court found, a statute calling for clerical work instead of a "detailed inquiry" and "systematic examination" is unconstitutional.

Second, the Auditor's underlying logic—that statutes not only enforce, but also *redefine* Constitutional text—would essentially end judicial review. Specific statutes may enforce constitutional provisions, but they do not change the meaning of the Constitution. This Court should not adopt such circular reasoning.

C. The "Sandbagging" Concern Does Not Apply Here

Respondents decry experts' trial testimony as "sandbagging." This claim is not based on the record, is contrary to the law, irrelevant, and unpreserved.[5]

[5] The trial court admitted the testimony of Mr. Allred's expert, Dr. David Macpherson, over Respondents' objection that Dr. Macpherson could not render an opinion on the ultimate issue. Tr. 143-148;159. To avoid this objection, Dr. Macpherson simply testified that it was "misleading" and "understates the cost to state and local governments…by an order of magnitude at least." Tr. 148:10-158:21; 159:8-18. There was no objection based on the purported 10-day rule or "sandbagging" issue. Any appellate point raising the admissibility of this testimony was therefore waived. *See, e.g., Fleshner v. Pepose Vision Institute, P.C.*, 304 S.W.3d 81, 97 (Mo. banc 2010).

1. Nothing in the Record Establishes that Within the First Ten Days, Mr. Allred Was an Opponent Who Withheld Data from the Auditor

Although Mr. Allred may now qualify as a petition opponent, the only facts at trial established that he learned of the petition's filing on October 6, 2011. Tr. 183-184. But the Auditor does not call for public comments, and under the statute, only proponents or opponents have the right to make submissions within ten days. § 116.175.1, RSMo. There was no evidence that Mr. Allred was or had decided to become an opponent at that early date, much less that in the ensuing 9 days before the deadline for responses, he had scrambled to learn about the petition, retain an expert, have an opinion prepared, and devise a plan to "withhold" it from the Auditor.

Further, there was no evidence that Dr. Macpherson relied on non-public information that was only within Mr. Allred's reach or that could not have been easily obtained by anyone interested. The Auditor claims to have vast knowledge and experience based on audits of state and public entities, but never leveraged that enormous advantage to determine whether $1 million was even close to the "direct cost" of wage increases to public entities. The record fails to substantiate the claim that Mr. Allred became an opponent during the 10-day period, obtained special data during the 10-day period, and withheld it.

2. A Full Record Can and Should Be Developed in the Trial Court; There Is No 10-Day "Pre-Filing" Requirement

The statute's plain language is clear: "*Any* citizen who wishes to challenge the...fiscal note...may bring an action in the circuit court of Cole County." § 116.175.1, RSMo (emphasis added). The petition need only "state the reasons why the fiscal note or the fiscal note summary portion of the official ballot title is insufficient or unfair and...request a different fiscal note or fiscal note summary [.]" The court is directed to "consider the petition [and] hear arguments." § 116.190.4, RSMo. In the absence of ambiguity, the plain language of a statute is controlling. *See, e.g., Akins v. Dir. of Revenue*, 303 S.W.3d 563, 565 (Mo. banc 2010). No further analysis is necessary, as Section 116.190, RSMo does *NOT* require pre-filing of comments with the State Auditor in order to maintain a suit challenging the fiscal note and summary.

The plain language interpretation tracks related legal principles. Because the Auditor conducts no hearing in determining the "legal rights, duties, or privileges," of parties to the petition process and absent Section 116.190, RSMo, there would be no other means of judicial review, his decision is akin to a non-contested case which would ordinarily be reviewable *de novo* on a full factual record by a circuit court under Section 536.150, RSMo. *See State ex rel. Martin-Erb v. Mo. Com'n on Human Rights*, 77 S.W.3d 600 (Mo. banc 2002) (because no other statute allowed review of probable cause decision, it was open to "arbitrary and capricious" review under Section 536.150).

Following this general principle, in petition cases, the circuit court's adjudication of the sufficiency of a petition is "a matter of original evidence" and is not restricted to the record before the Secretary of State. *See Ketcham v. Blunt*, 847 S.W.2d 824, 830 (Mo. App. W.D. 1992) (the Secretary of State makes "the ultimate administrative determination as to whether the petition complies with the Constitution of Missouri and with the statutes," but "it is the courts who are charged with the ultimate judicial determination as to whether…the petition is sufficient…"). In short, while ultimately irrelevant given Mr. Allred's specific arguments on appeal, Section 116.190 contains no 10-day "pre-filing" requirement.

3. The Relevant Facts on This Appeal Are Undisputed, the Auditor's Errors Were Based on Evidence He Received Within the First Twenty Days, and this Court Can Simply Apply *De Novo* Review to the Trial Court's Conclusions Regarding the Legal Duties the Auditor Owed

Finally, as Mr. Allred's opening brief explains, this appeal does not address whose expert was right, or whether JWJ grossly overstated positive fiscal impacts. Instead, it considers the Auditor's use of the information he received within the first fifteen days of his review, when he apparently received the proponents' late response. As Mr. Allred showed below and in his first brief, the Auditor's failure to truly assess or estimate direct cost, and his misstatement

regarding factors he knew would drive down revenue increases, make his note and summary insufficient and unfair.

The trial court disagreed, but as the Auditor now admits, its application of law to the facts receives *de novo* review. State Br. 9. JWJ identifies only three factual findings deserving "deference," and none are relevant on appeal. JWJ Br. 29. Thus, the parties agree that *de novo* review applies. On the two issues Mr. Allred raises on appeal, this is not a "sandbag" case and this Court can simply determine whether the Auditor's work was sufficient and fair.

V. The Undisputed Record Shows that the Auditor's Fiscal Note and Summary Were Insufficient and Unfair

Respondents cut and paste prior briefing, but neither takes direct issue with Point II.C of Mr. Allred's opening brief by explaining why mere compliance with bare-bones "steps" previously approved in *MML I* should insulate the *end result* of the Auditor's process from attack. As Mr. Allred previously demonstrated, merely following the steps mentioned in *MML I*, which relied on that court's understanding of the facts, does not confer "procedural immunization" in all future cases. Rather, in each case, courts review the undisputed facts received by the Auditor to determine if the note and summary are sufficient and fair, and on appeal, review is *de novo*. By attempting factual defenses of the note, Respondents arguably concede Mr. Allred's initial point: Sections 116.175 and 116.190 are not automatically satisfied merely because (1) submissions are pasted

verbatim into the fiscal note, and (2) material from the fiscal note summary can be located in the note. *Compare* Judgment at 15 (L.F. 220).

A. The Fiscal Note and Summary Did Not Come Close to Assessing or Stating the Direct Cost of an Increase in Public Entities' Wages

Neither Respondent seriously argues that the Auditor's "exceeds $1 million" statement approached the true "direct cost" of wage increases. Neither argues that the public sector proportion of the combined public-private increase in wage costs—for purposes of this appeal, $360 million—was even close to 1/360th, or $1 million. Instead, they provide excuses for the Auditor's inability to come within an order of magnitude of the true figure of approximately $16 million.

First, they claim the Auditor used a "cross-section," which was good enough. But a "cross-section" is only useful as a sample to make some extrapolation about the whole. Here, a single responder, a community college, reported costs of $405,000. The Auditor drew no conclusion about what this might mean for total state and local costs, or considered whether a single community college could really constitute over a third of the "whole" the Auditor reported to Missouri voters. L.F. 48, 62. Rather than questioning his "cross section," the Auditor literally added up the sample and inserted the word, "exceeds." At trial, the Auditor gave no reason for the failure to use some means of extrapolation or estimation. *See* Tr. 68:21-69:5.

Next, Respondents claim contacting every single employer was impractical. This is another straw man: a fair and sufficient note and statement required no such herculean effort. Both JWJ and Dr. Macpherson used public information from the Bureau of Labor Statistics to estimate affected employees and their wage income. *See* L.F. 49-55; Tr. 150:16-151:13. JWJ's initial submission used this method, and JWJ made itself freely available to the Auditor. *See* Jt. Ex. 7; *see also* L.F. 49-55. It is implausible that given the Auditor's claimed knowledge and expertise regarding state and local entities (Tr. 77:24-79:4), he could not have identified and made even a solitary follow-up to Missouri's largest public employers.

JWJ claims that some entities' failure to respond is significant. But the Auditor made no such assumption, and Halwes admitted he made no effort to find out why entities like St. Louis failed to provide cost responses to his first and only request. Tr. 70:10-71:3. JWJ's claim that non-responders would be unaffected by a wage increase is pure speculation.

Finally, the Auditor used JWJ's submission which suggested that public and private entities would pay out $360 million in wage increases, but perhaps because he received it late, failed to consider whether his "exceeds $1 million" even approached reasonableness given the relative size of private and public employment.

Absolute precision is not the standard, and for that reason Mr. Allred does not argue that the Auditor must have reported precisely $16 million. But the

Auditor knew enough by the end of the comment period—about the inadequacy of his own process, the responses, and the incongruent 1:360 public to private ratio his summary assumed—to know that "exceeds $1 million" was neither a fair nor sufficient way to convey the direct cost to state and local employers.

B. The Summary Failed to State that the $14.4 Million Revenue Increase Was a Ceiling Which Would Decrease With Layoffs or Drop-offs In Business Investment

Again, the facts are undisputed. JWJ now admits—contradicting Mr. Halwes' efforts at trial—that $14.4 million was a true revenue ceiling and that business decisions can only force it down. *See* JWJ Br. at 34 (admitting that increase is only "up to $14.4 million" and "may be less"); 35 ("business decisions…would impact revenues by causing them to decrease"); 44 (claiming the Auditor "estimated that increases in revenues *would be offset by job losses*").

Abandoning any factual dispute, JWJ retreats to a single argument: that one adverb, "however," conveys to voters that the "business decisions" were *layoffs and spending cuts* which would *decrease*, not merely "impact" the $14.4 million increase. JWJ Br. 35. If "however" conveys this meaning, what explains Mr. Halwes' gamely attempt at trial—until impeached by prior testimony—to claim that he intentionally used vague phrasing to allow for possible increases in hiring or investment which he speculated could come from the wage increase? Tr. 60:1-61:16; *see also* Tr. 61:17-62:11. As Mr. Allred showed in his first brief, nothing in supported such speculation. Respondents' story keeps changing. What does

not change is the fiscal note summary's unfairness and inadequacy. While it need not be the "best," it also cannot be the "worst," and this is close to it.

VI. This Court Should Make No Findings on Signature Validity

JWJ uses its response brief to ask this Court to declare all of its signatures valid. JWJ Br. 48. As discussed in Mr. Allred's brief which responded to JWJ's identical suggestion in JWJ's constitutional brief, this argument was not properly preserved, depends on additional facts that must be developed in a trial court, and is unripe because the statute which creates a cause of action to resolve such issues, Section 116.200, has not yet been triggered (and may never be triggered if insufficient signatures are certified or other contingencies fail to occur).

Two additional points deserve a response. First, JWJ affirmatively refused to litigate this issue in the trial court. *See* L.F. 203-205 (moving to strike part of Mr. Allred's pleading raising this issue, which Mr. Allred agreed to withdraw). Second, JWJ is wrong that Section 116.195's "reprinting" provision implies that even signatures on petitions with unfair, insufficient, and misleading ballot titles should count. For example, where proponents do not wait until the last minute to file and circulate petitions, Section 116.190 will require new ballot titles to be certified and new petitions to be circulated. In such cases, signatures on old petitions will not count, but ballots with the new official titles may need to be printed. At any rate, Mr. Allred's request for additional relief was not before the trial court and is not properly before this Court.

Conclusion

The summary statement, fiscal note, and fiscal note summary for the initiative are insufficient and unfair. The trial court should be reversed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that the foregoing brief (a) contains the information required by Rule 55.03, (b) was prepared using Microsoft Word 2010 in Times New Roman size 13 font, and (c) complies with the word limitations of Rule 84.06(b) in that it contains 7,494 words.

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CERTIFICATE OF SERVICE

I hereby certify that on the 22nd day of June, 2012, the foregoing Brief was filed electronically with the Clerk of the Court to be served by operation of the Court's electronic filing system on the following counsel of record:

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